U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0107 BLA

WILLIAM H. MAYNARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARGUS ENERGY, LLC	)	DATE ISSUED: 09/30/2016
	)	
and	)	
	)	
NEW HAMPSHIRE INSURANCE/ CHARTIS	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Leonard J. Stayton, Inez, Kentucky, for claimant.

Sarah Y. M. Himmel (Two Rivers Law Group PC), Christiansburg, Virginia, for employer/carrier.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting Associate Solicitor; Michael J. Rutledge, Counsel for

Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (2013-BLA-5082) of Administrative Law Judge Drew A. Swank, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on February 1, 2012, and is before the Board for the second time.

In his initial decision issued on April 7, 2014, the administrative law judge, applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] credited claimant with at least fifteen years of qualifying coal mine employment and found that claimant established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). The administrative law judge further determined, however, that employer successfully rebutted the presumption. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing that claimant's total disability did not arise from his coal workers' pneumoconiosis. *Maynard v. Argus Energy LLC*, BRB No. 14-0234 BLA (Apr. 30, 2015)(unpub.). Initially, the Board noted that the administrative law judge applied an incorrect standard in adjudicating this claim, as the administrative law judge relied on the prior version of 20 C.F.R. §718.305 (2001) to establish rebuttal.[2]

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment are established. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

[2] In relying on the prior version of 20 C.F.R. §718.305 (2001), in order to establish rebuttal, the administrative law judge stated that "the party opposing entitlement [must]

The Board held that the administrative law judge also incorrectly stated that he need not reach the issue of the existence of pneumoconiosis because it was settled by his finding invocation of the Section 411(c)(4) presumption established. *Id.*, slip op. at 4. The Board noted that the administrative law judge, instead, weighed the opinions of Drs. Gaziano and Rosenberg to determine "whether the miner's total disability arises from his coal workers' pneumoconiosis due to his past coal mine employment." *Id., citing* 2014 Decision and Order at 16. Because the administrative law judge concluded that "[c]laimant has not proven that . . . clinical coal workers' pneumoconiosis was a 'substantially contributing cause' of the miner's total disability," 2014 Decision and Order at 16, 17, and did not properly consider whether employer established that no part of the miner's disabling pulmonary impairment was caused by legal pneumoconiosis, the Board remanded this case for further findings under the proper standard. *Maynard*, BRB No. 14-0234 BLA, slip op. at 6.

The Board further held that the administrative law judge erred in crediting the medical opinion of Dr. Rosenberg without considering whether the physician provided valid rationales for his conclusion that claimant's obstructive impairment was unrelated to dust exposure in coal mine employment. *Id*. at 6-7. The Board instructed the administrative law judge, on remand, to address claimant's argument that Dr. Rosenberg's view that claimant's reduced FEV_1/FVC ratio is inconsistent with the pattern of impairment caused by coal dust exposure conflicts with the medical science credited by the Department of Labor (DOL) in the preamble to the 2001 revisions to the regulations.[3] *Id.* at 7. The Board further instructed the administrative law judge to

---

demonstrate by a preponderance of the evidence either: (1) the miner's disability does not, or did not, arise out of coal mine employment; or (2) the miner does not, or did not, suffer from pneumoconiosis." 2014 Decision and Order at 16.

[3] The Board stated that:

> Whether Dr. Rosenberg's interpretation of the significance of claimant's reduced FEV_1/FVC ratio conflicts with the view set forth in the preamble, and whether employer, through Dr. Rosenberg's opinion, has laid the proper foundation for disputing the studies that the [Department of Labor] discussed, are questions for the administrative law judge to resolve on remand.

Maynard v. Argus Energy LLC, BRB No. 14-0234 BLA, slip op. at 7 n.7 (Apr. 30, 2015)(unpub.).

address whether Dr. Rosenberg credibly explained why the irreversible portion of claimant's impairment was not related to coal dust exposure, or why his partial responsiveness to bronchodilators eliminated such exposure as a contributing cause of his disabling residual impairment. *Id*. at 8. The Board remanded the case for the administrative law judge to determine whether employer established rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i), (ii), by disproving the presumed existence of both legal and clinical pneumoconiosis,[4] or by proving that no part of the miner's respiratory or pulmonary disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *Id.* at 8-9.

On remand, the administrative law judge found that employer established that claimant does not have either clinical or legal pneumoconiosis, thereby rebutting the Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant challenges the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by establishing the absence of legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not file a complete substantive response, unless specifically requested to do so by the Board. The Director, however, notes his agreement with claimant's contention that the administrative law judge failed to comply with the Board's remand instructions and, therefore, urges that the denial of benefits be vacated and the case remanded to the administrative law judge for further consideration.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence

[4] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

and in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant and the Director challenge the administrative law judge's weighing of the medical opinions on the issue of legal pneumoconiosis. On remand, the administrative law judge reconsidered the medical opinions of Drs. Gaziano and Rosenberg. Dr. Gaziano diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD), due, in part, to coal mine dust exposure. Director's Exhibit 11. In contrast, Dr. Rosenberg opined that claimant does not have legal pneumoconiosis, but has an obstructive pulmonary impairment due to his long smoking history and morbid obesity. Employer's Exhibit 1 at 5-7.

Noting the Board's remand instructions, the administrative law judge found that the opinion of Dr. Rosenberg was entitled to moderate weight in establishing the absence of legal pneumoconiosis, whereas the opinion of Dr. Gaziano was entitled to little weight in establishing the presence of legal pneumoconiosis. Decision and Order on Remand at 7. Weighing the opinions together, the administrative law judge found that Dr. Rosenberg's opinion outweighs the opinion of Dr. Gaziano. *Id*. at 8. Consequently, the administrative law judge found that employer established the absence of legal pneumoconiosis.

Claimant and the Director assert that the administrative law judge erred in finding that the opinion of Dr. Rosenberg outweighed the opinion of Dr. Gaziano. Claimant's Brief at 13-17; Director's Brief at 1. We agree. Considering Dr. Rosenberg's opinion on remand, the administrative law judge noted that the physician provided two main reasons for eliminating coal mine dust exposure as a source of claimant's COPD: 1) claimant's FEV_1/FVC ratio showed a marked reduction during pulmonary function studies which, in Dr. Rosenberg's opinion, indicates that claimant's impairment is entirely related to cigarette smoking; and 2) claimant had a significant response to the administration of bronchodilators which, Dr. Rosenberg stated, is also not consistent with the permanent effects of a coal mine dust-related disease. Decision and Order on Remand at 6-7, *referencing* Employer's Exhibit 1 at 4-7.

The administrative law judge initially found that Dr. Rosenberg's reliance on the FEV_1/FVC ratio to eliminate coal mine dust as a source of claimant's impairment may

[5] Because claimant's last coal mine employment occurred in West Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibit 3.

conflict with the medical science accepted by the DOL, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV1/FVC ratio. Decision and Order on Remand at 7; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Consequently, the administrative law judge accorded little weight to Dr. Rosenberg's conclusion based on this reasoning. *Id.* Nevertheless, the administrative law judge found that there was still merit to Dr. Rosenberg's opinion, stating:

> Dr. Rosenberg, however, did not rely solely on [c]laimant's FEV_1/FVC ratio in finding that [c]laimant does not have legal pneumoconiosis. Instead he also stated that [c]laimant does not have legal pneumoconiosis because [c]laimant responded to bronchodilators during pulmonary function testing, which is inconsistent with a coal mine dust-related disease.

Decision and Order on Remand at 7. Specifically, the administrative law judge accorded this portion of Dr. Rosenberg's opinion significant weight, finding that pneumoconiosis is a progressive and irreversible disease that does not usually respond to bronchodilators. *Id*.

As claimant and the Director assert, however, in crediting Dr. Rosenberg's opinion on the ground that the physician provided an additional reason for concluding that claimant does not have legal pneumoconiosis, the administrative law judge did not discuss the credibility of this additional reason, as instructed by the Board. *See Maynard*, BRB No. 14-0234 BLA, slip op. at 10; Claimant's Brief at 13-17; Director's Brief at 1. Rather, the administrative law judge simply accepted Dr. Rosenberg's additional reason at face value without addressing whether Dr. Rosenberg credibly explained why claimant's partial response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of the irreversible portion of his obstructive impairment. *Maynard*, BRB No. 14-0234 BLA, slip op. at 10; *see Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *see Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Clark*, 12 BLR at 1-155. However, as claimant and the Director assert, in crediting the opinion of Dr. Rosenberg, the administrative law judge again failed to address whether the explanations the physician provided, and the testing upon which he relied, supported his conclusion that coal mine dust exposure did not contribute to, or aggravate, claimant's disabling respiratory impairment along with cigarette smoke exposure and obesity. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524,

533, 21 BLR 2-323, 2-336 (4th Cir. 1998). We, therefore, vacate the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis.

On remand, because employer bears the burden of proof on rebuttal, the administrative law judge must determine whether the opinion of Dr. Rosenberg, the only medical opinion supportive of employer's burden, is well-reasoned and credible, and affirmatively establishes that claimant does not have legal pneumoconiosis.[6] *See* 20 C.F.R. §718.305(d)(1)(i); *Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Clark*, 12 BLR at 1-155; *Maynard*, BRB No. 14-0234 BLA, slip op. at 10. Moreover, because we have vacated the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis, we also vacate the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[7] *See* 20 C.F.R. §718.305(d)(1)(i).

If, on remand, the administrative law judge again finds that employer has disproved the existence of both legal and clinical pneumoconiosis, employer has rebutted the Section 411(c)(4) presumption at 20 C.F.R. §718.305(d)(1)(i), and the administrative law judge need not reach the issue of disability causation. If employer fails to rebut the presumption at 20 C.F.R. §718.305(d)(1)(i), the administrative law judge must determine

[6] As set forth in the Board's prior decision, because employer bears the burden of proof in establishing rebuttal of the Section 411(c)(4) presumption, "the administrative law judge must determine whether the opinion of Dr. Rosenberg, employer's expert, is reasoned and credible, irrespective of the weight accorded to the opinion of Dr. Gaziano, claimant's expert." *Maynard*, BRB No. 14-0234 BLA, slip op. at 10 n.12, *citing Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

[7] The administrative law judge found the evidence insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 8-12. Specifically, the administrative law judge found that the record contains one chest x-ray, which was read as negative for pneumoconiosis, Director's Exhibit 11, and no autopsy or biopsy evidence. *Id*. at 9-10. Additionally, he found that neither Dr. Gaziano nor Dr. Rosenberg diagnosed clinical pneumoconiosis. *Id*. at 11; Director's Exhibit 11; Employer's Exhibit 1. Consequently, weighing the evidence as whole, the administrative law judge permissibly found that the x-ray and medical opinion evidence favors employer in disproving the existence of pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(B); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Id*. at 12. Because the parties do not challenge this finding, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

whether employer has rebutted the presumed fact of disability causation at 20 C.F.R. §718.305(d)(1)(ii) with credible proof that no part, not even an insignificant part, of claimant's pulmonary or respiratory disability was caused by either legal or clinical pneumoconiosis. *See Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149 (2015) (Boggs, J., concurring & dissenting); *see also W. Va. CWP Fund v. Bender*, 782 F.3d 129, 143-44, BLR (4th Cir. 2015).

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge